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IN THE

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
Petitioner,

vs.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This controversy arises under the Bankruptcy Law of the United States. The action was by the Trustee in Bankruptcy for the recovery back of certain payments made by the bankrupt to Petitioner within the four months before it was adjudicated to be a bankrupt, upon the ground that such payments constituted an unlawful preference. The judgment sought to be reviewed awarded a recovery back of all such payments. Petitioner was the bankrupt's banker and the payments in question were made by checks drawn by the bankrupt against its account in Petitioner's bank.

As stated in our petition for the writ, two questions are presented:

I. Was the adjudication in bankruptcy—the act of bankruptcy being preferential payments while insolvent—a conclusive determination *as to all creditors* that the bankrupt was insolvent *for the full period of four months* prior to the filing of the petition in bankruptcy?

II. Was there any evidence to be submitted to the jury upon the question whether Petitioner (defendant there) had *reasonable cause to believe* that the payments made by the debtor would effect a preference?

We will discuss these questions separately.

I.

Was the adjudication in bankruptcy—the act of bankruptcy being preferential payments while insolvent—a conclusive determination AS TO ALL CREDITORS that the bankrupt was insolvent FOR THE FULL PERIOD OF FOUR MONTHS prior to the filing of the petition in bankruptcy?

Petitioner was not a party to the proceedings for the adjudication in bankruptcy; was not one of the petitioning creditors; did not appear or intervene; took no part whatever in the proceeding; and in fact it does not appear that Petitioner had any notice of the pendency of the proceeding. The act of bankruptcy alleged was that the Chemical Company had transferred, while insolvent, a portion of its property to one or more of its creditors with the intent to prefer such creditors over its other creditors (R. 186, 187). The creditors to whom such preferences were alleged in the petition to have been given were eight in number. Petitioner was one of them; but the report of the Special Master to whom the issues raised by the petition and answer were referred does not mention petitioner (R. 197-

201). The other seven creditors named in the petition are mentioned in the report (R. 197). The report states that the petition

> "alleges the payment of preferences within four months of the filing of the petition to various parties, these parties so receiving alleged preferences" (R. 197),;

then follow the names of the seven creditors mentioned in the petition other than the Petitioner here.

The findings of the Special Master set forth in the report are:

> "On June 25, 1909, when the petition was filed, and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was *known by its directors to be insolvent.* During such four months period the corporation paid out the moneys alleged in the petitioning creditors' petition and those payments were preferences within the meaning of the Acts of Congress relating to bankruptcy" (R. 201).

The findings were confirmed by the Court and an adjudication in bankruptcy made (R. 201).

The trial court in the action here sought to be reviewed held the findings upon the question of insolvency to be *res adjudicata* as to all the world, including Petitioner herein. Upon the trial, Petitioner (defendant there) was not permitted to introduce evidence as to the solvency of the debtor at the time the payments sought to be recovered back were made. All offers of such evidence were excluded.

Exceptions and Rulings, Rec. 55-61, 74 and other pages;

Assignments of Error 15, 16, 17, 19, 20, 29, 32, Rec. 222-224.

Not only was Petitioner (defendant there) not permitted to litigate the question of solvency at the time the payments were made, but in litigating the question whether Petitioner had reasonable cause to believe that the payment would effect a preference, Petitioner was compelled to confine its proofs to the very narrow limits of whether—the insolvency of the debtor being established—Petitioner had reasonable cause to believe that a preference would be effected by the payments. (See, particularly, Record 32 and 45.) In other words, Petitioner was not permitted to offer evidence as to the financial condition of the debtor at the time the payments were made, which it would seem very obvious would have a most important bearing upon determining whether Petitioner had reasonable cause to believe that a preference would be effected by the payments. If the financial condition of the debtor were very close to the line between solvency and insolvency, or if it was substantially the same as it had been for some months or years, much stronger facts and circumstances would be required to give the creditor "reasonable cause to believe" than if the debtor had experienced a sudden and notorious change in its financial condition. Nevertheless, Petitioner was compelled to confine its proofs to whether—the insolvency of the debtor being established—Petitioner had reasonable cause to believe that the payments would effect a preference.

Charge of Court, Rec. 179-180.

The ruling of the trial court was affirmed by the State Supreme Court, which in so doing said:

> "We think the weight of authority sustains the contention of plaintiff's counsel and the position of the Court that the bankruptcy proceedings were conclusive in these proceedings upon the question of the insolvency of the Company on the date of fil-

ing its petition and for four months prior thereto, and that the directors had knowledge thereof." (R. 237.)

It is important also in this connection to note that while the petition alleged that payment of the claim in controversy was an act of bankruptcy, nevertheless the record does not show that any evidence was introduced with reference to this payment, and the finding of the Referee adjudicating the St. Louis Chemical Company a bankrupt refers specifically to and finds specifically that the other matters complained of as acts of bankruptcy were established, but makes no reference whatsoever to the payment of Petitioner's claim. It is further important in this connection that Petitioner's position at the time of the filing of the involuntary petition in bankruptcy was not that it was a creditor, but that its claim had been paid in full, so that it then held no outstanding obligation of the St. Louis Chemical Company.

In holding that the adjudication in bankruptcy conclusively established, as against Petitioner, the insolvency of the St. Louis Chemical Company at the time of the payments to Petitioner, the Michigan Supreme Court relied upon the following cases:

Bear vs. Chase, 99 Fed. 920; 40 C. C. A. 182;

In re American Brewing Co., 112 Fed. 762; 50 C. C. A. 517;

Hackney vs. Hargraves, 68 Neb. 624; 94 N. W. 822; 99 N. W. 675;

In re Hecox, 164 Fed. 823; 90 C. C. A. 627;

Cook vs. Robinson, 194 Fed. 785; 114 C. C. A. 505.

The majority of these are not in point.

Bear vs. Chase, supra.

This case merely held that where an involuntary petition alleged that the debtor had suffered creditors to obtain a preference through levy under attachment writs, the Court of Bankruptcy by order to show cause served upon attaching creditors—and to which they answered—might restrain them from further prosecuting the actions upon which the attachments were issued. This was before any adjudication in bankruptcy had been made.

Re American Brewing Co., supra.

In this case Magnus' Sons—the parties claimed to be concluded by the adjudication—had appeared in the proceedings prior to the adjudication.

Hackney vs. Hargraves, supra.

This case is in no wise in point. The holding was that the schedules of a bankrupt showing his liabilities are

> "admissible *not as conclusive* of the alleged insolvency, but as *tending to prove that issue.*"

The Court in its opinion also said that

> "An adjudication of bankruptcy is manifestly *admissible in evidence* for the purpose of establishing the fact of insolvency."

There is nowhere in this case any holding that the adjudication is conclusive, but, on the contrary, that it is only evidence of insolvency.

In the cases of *In re Hecox* and *Cook vs. Robinson*, both supra, the party as to whom an adjudication was held conclusive was a creditor whose preference consisted merely in the attachment of goods for the satisfaction of his claim or judgment obtained thereon. In neither case had the claim been paid; so that the parties still appeared as creditors of the bankrupt.

This Court established the rule as to the effect of an order adjudicating a person or corporation a bankrupt in the case of

Manson vs. Williams, 213 U. S. 453; 53 L. Ed. 869; 29 Sup. Ct. 519; 22 Am. B. R. 22.

One Henry Hudson had purchased a stock of goods and placed his brother James in the store in charge of the sale of them, the business being carried on as The Hudson Clothing Company. Henry was adjudicated a bankrupt, and later an involuntary petition was filed against both Henry and his brother James as partners doing business as The Hudson Clothing Company. The Trustee of Henry filed a denial and answer, but an adjudication was, nevertheless, made without a hearing being given to the Trustee of Henry Hudson. It was claimed that in a suit for possession of the stock of goods used in the business of The Hudson Clothing Company the Trustee of Henry Hudson was barred and concluded by the adjudication as to the Clothing Company. This contention was denied by this Court, and through Justice Holmes the following rule was laid down:

> "The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be as against the world, but it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt vs. Kelsey*, 207 U. S. 43, 52."

And previously, in *Tilt vs. Kelsey*, relied upon, as shown in *Manson vs. Williams*, this court declared the effect of a judgment of this nature as a proceeding in rem.

> "Nor is it true that a judgment because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an

adjudication of the facts upon which it is grounded."

See, also,

In re McCrumm, 214 Fed. 207; 130 C. C. A. 555; 32 Am. B. R. 604;

Silver vs. Tift, 123 Ga. 804; 51 S. E. 748; 1 L. R. A.-N. S.-386; 17 Am. B. R. 9.

In concluding this subject we respectfully submit that the trial court and the Supreme Court of Michigan erred in deciding that the adjudication in bankruptcy was a conclusive determination as to all creditors that the bankrupt was insolvent for the full period of four months prior to the filing of the petition in bankruptcy.

II.

Was there any evidence to be submitted to the jury upon the question whether petitioner (defendant there) had REASONABLE CAUSE TO BELIEVE that the payments made by the debtor would effect a preference?

(This question was raised by our motion to direct a verdict when plaintiff concluded putting in his case (R., 134) and again when the putting in of the testimony was finally concluded (R., 169) and again in our requests to charge (R., 172 and 173). Petitioner duly excepted to these rulings and assigned error upon them.) (See Record, pp. 136, 170; Assignments of Error, 41, 44, 51, 53, 54,, pp. 225-227).

A mortgage upon the lands, buildings, machinery and equipment of the Company had been given a few years earlier by the predecessor in ownership to secure an authorized issue of $100,000 of bonds. Of these bonds $56,000 had been sold and disposed of. The remainder ($44,000)

had been pledged in parcels to various banks and others as collateral security for certain notes next mentioned. Upon the organization of the bankrupt company—the reorganization of the business—in 1907, each of the ten Directors had raised $2,500 for the Company as working capital, making an aggregate of $25,000 so raised. (R., 77.) These sums were raised by giving notes of the Company endorsed or guaranteed by each Director to the extent of $2,500, and by pledging bonds as aforesaid. Petitioner had taken one of these notes for $5,000, guaranteed by two Directors and further secured by $9,000 of bonds. This note fell due January 25, 1909. (R., 25.) (This was before any of the payments in question were made.) Soon after it became due Mr. Alger, Secretary of the bankrupt company, informed Petitioner's Cashier that they expected to pay the note in a short time and would prefer not to renew it. Petitioner assented and held the note as a past due obligation. (R. 149.) It is payments upon this note that are in question in this proceeding. In the latter part of 1908 the Directors of the Chemical Company informally agreed or arranged among themselves that the materials on hand should be worked up into manufactured product and sold and the bills and accounts receivable collected and converted into cash and the proceeds used to pay off, first the notes of the Company which had been guaranteed or endorsed by the Directors or for which the Directors were in any other manner responsible; and second, the general unsecured creditors. (R.,80-83.) Payments in pursuance of this arrangement were begun in February, 1909, and continued until Petitioner's note—in common with all others of the $25,000 of notes, except one for $2,500—had been paid in full. (R., 31, 37, 41-52, 68-86.)

While there was testimony that the Directors, at the time the arrangement was made, thought they could pay

all the indebtedness (R., 90), nevertheless, as before pointed out in this petition, the adjudication in bankruptcy was in this action held to be conclusive that the Company was insolvent at the time the payments were made, and known to be so by the Directors.

The President, Vice-President, Cashier and Assistant Cashier of Petitioner were sworn as witnesses. The Vice-President (Henry J. Tuger) was also a director of the bankrupt and knew of the arrangement to pay off the notes. One of the guarantors of the note held by Petitioner—D. E. Harrison—was Vice-President of the bankrupt and was a member of the Board of Directors and Examining Committee of Petitioner. The knowledge which Mr. Tuger and Mr. Harrison—or either of them—had as to the financial condition of the Chemical Company or the arrangement to pay off the notes, was held not to be imputed to Petitioner because of the adversary relation of these men in the particular transaction. Mr. Tuger had also obtained his $2,500 from Petitioner, but did so by giving his own note. There was no evidence that the knowledge of either of these men was communicated to any other officer or representative of the Bank, nor that either of them acted for Petitioner in any of the transactions involved in this suit. The Cashier testified on cross-examination, over the objection of attorneys for Petitioner, that if he had inquired of either of these men he undoubtedly would have learned the Bankrupt's financial condition, but that he did not inquire. (R., 156 and 157.) The Cashier testified on direct examination that he knew nothing as to any weakened financial condition of the Chemical Company; had no knowledge whatever that they were insolvent and no knowledge or notice that their condition was any different than it had been during the previous year; that he had no knowledge that there were other notes in

other banks which had been endorsed by the Directors of the Chemical Company (R., 148.) That he had no knowledge that in making these payments there was any intention on the part of the bankrupt company to effect a preference and no fact or circumstance was brought to his attention that would give him such knowledge. (R., 149.) Petitioner's President gave similar testimony. (R., 141, 142, 147.) The President and Cashier were stockholders of the Chemical Company; but it does not appear that they had any knowledge as to the financial condition of the Company or the arrangement to pay off the notes.

The payments made upon all the notes were by check upon Petitioner. That is, the Chemical Company carried its deposit account with Petitioner and as those funds came to it deposited them in this account. The Assistant Cashier testified that he knew other notes were being paid by checks drawn upon this account but he did not know "who were on the backs of the notes held by other Banks." (R., 30, 31.)

During the time the payments were being made a number of drafts drawn on the Chemical Company and three of its notes which came to Petitioner for collection were refused payment. The most of them were for comparatively small amounts. (R., 28-30.) A considerable number of drafts of large amounts, with bills of lading attached, were drawn upon the Chemical Company and paid by it through Petitioner. (R., 66 and 67; 116 and 117; 118 and 119.) The President of Petitioner testified that about one-half of the collections against business men of St. Louis who were financially responsible that came through Petitioner for collection between July 1, 1908, and July 1, 1909, were refused and returned, and also that it is

a usual custom for outside creditors to draw through Petitioner upon reputable business men of St. Louis for shipments with bill of lading attached. (R., 141.) The Cashier testified that business houses of St. Louis which were financially responsible frequently refused drafts that were drawn upon them for collection. (R., 150.) In two instances the Chemical Company made two payments on one note on the same day. The President, however, testified that the collection or bill register of Petitioner showed fourteen instances from November, 1908, to April, 1909, of more than one payment upon a note on the same day. That is, these were instances where other makers of notes had done the same thing as the Chemical Company. (R., 147.)

The President, the Cashier and the Assistant Cashier all testified positively that they had no knowledge or notice that there was anything wrong with the Chemical Company or any plan to pay off the guaranteed notes first. (R., 147, 148, 149 and 150.)

The financial responsibility of the guarantors was so great and so well-known to Petitioner that the ability of the Chemical Company to pay was really of no consequence and given no particular attention. (R., 155 and 160.)

The charge of the trial court upon the question of "reasonable cause to believe" is on pages 179 to 181. The pith of the charge is contained in the following paragraphs:

> "So you will see, gentlemen, the only question left for you to determine in this case is, was the bank chargeable under the rules I have laid down with notice of the fraudulent intent of the Chemical Company to deposit this money in the bank and make these preferential payments at the time that the money was so deposited in the bank and upon which the checks were afterwards drawn.

Now when the money was placed in the bank, the bank would owe the money to the Chemical Company. The Chemical Company owed a note to the bank. If the bank received this money in good faith and without knowledge, such knowledge as I have defined to you in my charge here, of the fraudulent intent upon the part of the Chemical Company, then it would have the right to offset its note against the money so deposited, and if the payments were received by the checks for the purpose of making payments upon the note, the bank under those circumstances could keep the money. But if it had notice or knowledge or if in the exercise of bad faith it abstained from learning those things when it might, by the exercise of reasonable diligence, and would have learned the fact that the money was placed there in pursuance of that plan of the Chemical Company to pay off certain of its directors and those who were endorsers upon its paper, then the bank could not keep the money and could not offset it against this note and would have to pay it back to the Trustee and receive its distributive share along with the other creditors when it proved up its claim.

That is the only question for you to determine in the case. In determining that question you have a right to take into consideration all of the evidence that has been offered and introduced in the case and allowed to go to you for that purpose." (R., 180 and 181.)

This instruction was approved by the State Supreme Court. (R., 234.) Under the Bankruptcy Law (Sec. 68-A) the Petitioner banker had a right to apply these deposits or to have them applied in payment of past-due paper.

See

Studley vs. Boylston Bank, 229 U. S. 523;

New York County Bank vs. Massey, 192 U. S. 138;

Continental Trust Co. vs. Chicago Title Co., 229 U. S. 435.

The only theory therefore upon which respondent could recover back these payments was that outlined in this charge. This is indicated in

Studley vs. Boylston Bank, Supra.

It is there said (see p. 529):

> "The Bankruptcy Act recognizes this right (the right of a bank to apply deposits to the payment of past-due paper) and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the Trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference."

Of course, it is to be understood in applying this language that such payment cannot be recovered unless the creditor had reasonable cause to believe that a preference would be thereby effected and this is indicated by other language in the same opinion. (See p. 526.)

We insisted in the trial court (R., 134, 170) and in the State Supreme Court, and we insist in this court, that the evidence did not warrant the court submitting this question to the jury. Both the trial court and the State Supreme Court disagreed with us, the latter saying:

> "Testimony was admitted tending to show that notice of these facts was brought home to the defendant." (R., 234 and 235.)

Is there evidence that Petitioner had reasonable ground to believe that these deposits were made in the bank for the purpose of enabling it and other creditors to secure a preference? If Petitioner knew or had reasonable cause to believe that the deposits were made for that purpose, it was its duty to refuse to receive them and to refuse thereafter to act as the bankrupt's banker. For, to receive them with that belief and with that belief to continue to act as the bankrupt's banker, is to make itself a party to a scheme

of fraud. It follows, therefore, that to contend that Petitioner received these deposits with knowledge or notice that they were made for the purpose of effecting an unlawful preference is to contend that it received them with such knowledge that it should thereafter refuse to continue to serve the bankrupt as its banker. *So that the question under present consideration is this: Is there in this record any evidence justifying the conclusion that it was the duty of Petitioner to refuse to continue to act as banker for the bankrupt?* When a banker refuses longer to serve an old customer, upon the ground that it is his purpose to use the bank as an instrument in a scheme of fraud, it should be able to refer to some evidence which has a legitimate and direct tendency to prove this charge. Does the record in this case disclose any such evidence?

Of course, there is such evidence if the knowledge of Directors Tuger and Harrison can be imputed to the Bank. As they obtained this knowledge while acting in an adversary relation to the Bank, the trial court held it could not be imputed. We do not understand that the correctness of this ruling is challenged. But it is contended (see Petitioner's brief opposing application for this writ, pp. 34-36) that the jury were properly permitted to infer that Tuger actually transmitted his knowledge to the other officials of the Bank February 8, 1909, when a line of credit of $6,000 was granted to the bankrupt company (a credit that was never used; R., p. 143). Their argument is, not that there is any evidence indicating that such communication was made (for there was no such evidence—indeed, the evidence is all to the contrary)—but they say: "It is beyond human credibility that that subject was not brought up and fully and fairly discussed." In other words, they ask a judicial tribunal to presume that a party to a scheme of fraud availed himself of the first opportunity to disclose it. It is scarcely necessary to say that precisely the contrary is to be presumed.

Respondent's counsel also invoke the rule that imputes to the principal the prior acquired knowledge of an agent when the latter is acting for the former in some transaction in which that knowledge is material. While we deny that that rule could by any possibility have application to a case of this character, it is quite sufficient to say that neither Tuger nor Harrison acted for the Bank in any of the transactions involved in this case.

Is there any other testimony in this case justifying the conclusion that it was the duty of Petitioner to refuse to continue to act as banker for the bankrupt?

Let us state this testimony as strongly as it can be stated in support of the contention of respondent:

There came to Petitioner notice that the bankrupt was not paying all its indebtedness as it matured; that it was paying drafts with bills of lading attached; that it was paying notes of other bankers; that in two instances it made two payments on one note the same day.

Precisely what inference the Petitioner should have drawn from these circumstances may be difficult to decide, but we submit that it should not have inferred that there existed the fraudulent and unlawful scheme of preference which made it its duty to refuse to continue to be the bankrupt's banker. To contend that the latter inference should be drawn is, of course, to contend that in all similar cases —cases in which a bank has notice of like circumstances— it should refuse longer to act as the banker of an old customer and thereby precipitate a bankruptcy which otherwise would have been avoided.

Is it not clear that such a refusal would be an unjustifiable refusal? Is it not clear that the bank which for such reasons refuses longer to extend its banking facilities to an old customer acts cowardly and suspiciously? In

dealing with such customers a bank is not bound to be, and has no right to be suspicious of their integrity. It should be its aim to help them—not to hinder them. At the first indication of trouble it has no right to desert them but, on the contrary, it should remember that it is its duty to protect them. As the Court from these circumstances could not have inferred that Petitioner had reasonable cause to believe that the payments would effect a preference or that it was chargeable with notice of the fraudulent scheme of the bankrupt's directors, it should not have permitted the jury to draw that inference. It should have applied in this case the principles of the opinion of this court in

Grant vs. National Bank, 97 U. S., p. 80,

and said of this evidence

> "that it falls short of establishing that" Petitioner "had reasonable cause to believe" that the payments made by the debtor would effect a preference.

We therefore insist that the trial court erred in submitting this question to the jury, and the Supreme Court erred in holding that the testimony warranted its submission. If we are right in the contention under present consideration, not only should the judgment be reversed, but, under the practice in Michigan (see Sec. 2 of Act 217 of Public Acts of 1915), the Appellate Court, in correcting the error of the trial court, should enter the judgment which that court should have entered. That is, in this case a final judgment in favor of the defendant should be entered, because there was no evidence from which the jury could infer that the payments in question were made with reasonable cause to believe that a preference would thereby be effected.

ELLIOTT G. STEVENSON,
WILLIAM L. CARPENTER,
Attorneys for Petitioner.

12.

No. 9[redacted]4[redacted]

Office Supreme Court, U. S.
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MAR 17 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,

A Corporation, Petitioner.

vs.

D. LLOYD JOHNSON,

As Trustee of the St. Louis Chemical Company, Bankrupt, Respondent.

BRIEF IN BEHALF OF RESPONDENT.

EDWARD J. MOINET,
EDWIN H. LYON,
WILLIAM A. BAHLKE,
Attorneys for Respondent.

DETROIT:
Record Printing Co., Free Press Building, 11-17 Lafayette Boulevard.
1917.

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
A CORPORATION,
Petitioner.

vs.

D. LLOYD JOHNSON,
AS TRUSTEE OF THE ST. LOUIS
CHEMICAL COMPANY, BANKRUPT,
Respondent.

Brief in Behalf of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

The petition in this case is addressed to the Court (p. 1) and admits and alleges (p. 7) that,

> "Your petitioner herein has no right of appeal to or writ of error from this Honorable Court."

And the petitioner prays (p. 7) that a Writ of Certiorari be issued to the Supreme Court of the State of Michigan.

The transcript of the record which was served with this petition shows (p. 304) that respondent recovered a money judgment in the lower court; that the cause was submitted to the Supreme Court of the State of Michigan on April 20, 1916 (p. 381); and that the judgment of the lower court was affirmed in the Supreme Court on December 21, 1916 (p. 372).

We call the attention of the Court to the fact that under Section 709 of the U. S. Comp. Sts. 1901, which remains in force, the method of reviewing this judgment of a State Court is by Writ of Error, and that only.

> "A judgment or decree, at law or in equity, of the highest court of a State is reviewable in the Supreme Court by writ of error only."
> *Loveland on Bankruptcy, Vol.* 2, *Sec.* 882.

Citing,

> *Cohens vs. Virginia*, 6 *Wheat*, 264, 410.
> *Verden vs. Coleman*, 22 *How.* 192.

Accordingly, we respectfully urge that the petition for a Writ of Certiorari in this case is not warranted by the practice and that the petition should be denied with costs.

It cannot be said that that portion of the prayer of the petition (p. 7) for "such other or further relief or remedy in the premises as to this Court may seem appropriate" broadens the petition so as to include therein an application for a writ of error, because that language obviously refers to anticipated relief following the allowance of a Writ of Certiorari, and on the same page petitioner disclaims an application for a writ of error because it alleges that (p. 7) "Your petitioner herein has no right of appeal to or writ of error from this Honorable Court."

At the time of serving the petition for a Writ of Certiorari, counsel for petitioner served what purports to be a copy of a motion for a Writ of "certiorari or other proper process" directed to the Supreme Court of the State of Michigan; also a notice that that motion and the petition for Writ of Certiorari will be submitted to this Honorable Court on March 19, 1917. Accordingly, if it be claimed by opposing counsel that if petitioner is not entitled to a Writ of Certiorari, it is at least entitled to a writ of error, we call attention to the rule of practice that an application for a writ of error must be made and submitted to a Justice of this court.

> "The practice is to submit the record of the State court to a Justice of the Supreme Court, whose duty it then is to ascertain upon examination whether the case upon the face of the record will justify the allowance of the writ. He may refer the application to the whole court for decision as to the propriety of the issuance of the writ. The Supreme Court will consider no application for a writ of error, unless a Justice of the court has endorsed on the record a request that the application be made to the full bench."

Foster's Fed. Practice (2nd Ed.), Vol 2, Sec. 477.

Citing,

Twitchell vs. Commonwealth, 7 *Wallace* 321.
Spies vs. Illinois, 123 *U. S.* 131, 143.
In re Kemmler, 136 *U. S.* 436, 437.
In re Ingalls, 139 *U. S.* 548.

In the case last cited, Chief Justice Fuller writing the opinion, this Court uses the following language:

> "We wish it to be distinctly understood that in future no such application (an application to the Court in session for the allowance of a writ of error) will be entertained, except when a Justice of this court, upon consideration of the record, has deemed it proper, under special circumstances, to endorse thereon a request that counsel be permitted to proceed in that way."

Therefore, we respectfully urge that even though the application here can by any charitable construction be considered as an application for a writ of error, it ought, also, to be denied with costs.

If, notwithstanding the foregoing objections to the allowance of any writ upon this application, the Court deems it proper to consider the petition, we call attention to the following as reasons why no writ should be allowed:

The petition in Bankruptcy (Rec. pp. 304-313) was filed in the Northern Division of the Eastern District of Michigan on June 25, 1909 (Rec. p. 10).

That that is the correct date of the filing of the petition appears from the fact that the two affidavits in support of the petition were verified on June 25, 1909 (Rec. pp. 311-313), when taken in connection with the further fact that the subpoena was issued on the same date, (Rec. p. 16).

In that petition the act of bankruptcy upon which an adjudication is prayed is as follows (Rec. pp. 306-7):

> "And your petitioner further represents that said St. Louis Chemical Company, said corporation, is insolvent and that within four months next preceding the date of this petition the said St. Louis Chemical

> Company committed an act of bankruptcy in this that it has heretofore, to-wit: at times and in the manner hereinafter set forth, transferred while insolvent, a portion of its property to one or more of its creditors with the intent to prefer such creditors over its other creditors and in manner as follows:"

and then follows (Rec. pp. 307-310) a statement of various alleged preferential payments commencing on February 26, 1909 (Rec. p. 307) and continuing from time to time until May 11, 1909 (Rec. p. 310).

Among the alleged preferential payments are the payments to the Petitioner herein for which judgment was recovered in the court below (Rec. pp. 7, 307).

The St. Louis Chemical Company filed its answer to that petition, verified by its secretary (Rec. pp. 313-322), and it is to be noted that nowhere in that answer does the Chemical Company deny the allegation of its insolvency during the four months next preceding the date of the petition.

The issue thus joined was duly litigated before the referee in bankruptcy acting as Special Master, and on August 23, 1910, he made and two days later filed his report and finding of facts, addressed to Hon. Henry H. Swan, the Judge of the Eastern District of Michigan (Rec. pp. 322-328).

In that report the Special Master found and reported the following specific facts (Rec. p. 328):

> "On June 25, 1909, when the petition was filed and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was *known* by *its directors* to be insolvent."
>
> "During such four months' period the corporation paid out the moneys alleged in the petitioning creditors' petition and these payments were preferences within the meaning of the Acts of Congress relating to bankruptcy."

And the reason why the Special Master found that the Chemical Company was insolvent was because the testimony satisfied him that it had only $30,000 of assets and liabilities of upwards of $88,000 (Rec. p. 324).

The petition herein alleges (p. 2) that the bankruptcy petition names eight creditors to whom preferential payments had been made which constituted the acts of bankruptcy for which an adjudication was sought; that Petitioner was named as one of those eight; and that the report of the Special Master does not mention Petitioner but does mention the other seven in his report.

While this question is immaterial here, in our view, yet it is perfectly evident that the Special Master undertook to enumerate *all* of the parties named in the bankruptcy petition as having received preferences, as his language shows (Rec. pp. 322-3), and that the name of the Gratiot County State Bank was inadvertently omitted in that enumeration.

As already stated, the Special Master specifically found (Rec. p. 328) that "During such four months' period the corporation (St. Louis Chemical Company) *paid out the moneys alleged in the petitioning creditors' petition*" and, as stated, this necessarily included and covered the payments made to the Gratiot County State Bank, because such payments are specifically stated in that petition (Rec. p. 307).

On April 26, 1911, Judge Swan signed and filed his order and adjudication (Rec. pp. 329-330) touching said report and stated therein (Rec. p. 329) that

> "* * * it is now here by the Court ordered that said Report and Findings of the Special Master be and the same are hereby confirmed and said Saint Louis Chemical Company of Saint Louis, in the County of Gratiot, in said District, is hereby adjudged and declared bankrupt, accordingly."

The report and findings of the Special Master, and the confirmation of that report and findings and the adjudication by Judge Swan have remained unappealed from and unreversed.

Accordingly, we respectfully submit that the allegation that the St. Louis Chemical Company was insolvent during the four months next prior to June 25, 1909, and during the entire time in which petitioner received the payments in question, became res adjudicata. That single charge of insolvency during that entire four months, and the transfer while so insolvent of a portion of its property, constituted

the sole act or acts of bankruptcy upon which an adjudication in bankruptcy was sought and made.

And it is no answer to the foregoing contention to suggest that the Special Master and the District Judge might have properly based their findings upon a time shorter than four months or upon a lesser number of preferential payments; because the fact remains that they both found that the insolvency existed during the entire four months and that all of the payments made during that time were preferential. Hence, no one can be heard to say that the fact of insolvency and the fact of preferential payments on any given date during that four months was any more or any less adjudicated than were those facts as existing upon any other date during the four months.

In fact, the theory of the petition was that the St. Louis Chemical Company was insolvent during the entire four months, as a single, indivisible proposition; and that it commenced to transfer portions of its property on the first day of that four months, to its creditors with intent to prefer them over its other creditors.

Accordingly, it is apparent that the adjudication of insolvency covered and included the entire four months next before the date of filing the petition, under the rule thus laid down:

> "But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication."
>
> *Cook vs. Robinson*, 194 *Fed. Rep.* 785, 791.
>
> *Loveland on Bankruptcy*, *Vol.* 1, *p.* 985.

And that the determination of this fact of insolvency during the entire four months next prior to the time of filing the petition possesses finality, is shown by the following authorities:

> "While the jurisdiction of the National Courts is limited, they are not inferior Courts, and their judgments possess every attribute of finality and estoppel which pertains to those of Courts of general jurisdiction."
>
> *In re First Nat. Bank*, 152 *Fed. Rep.* 64, 70.

Citing,

McCormick vs. Sullivant, 10 *Wheat.* 192, 199.
Ex parte Watkins, 3 *Pet.* 193, 207.
Des Moines Nav. & R. Co. vs. Iowa Homestead Co., 123 *U. S.* 552, 557, 559.
Edelstein vs. U. S., 149 *Fed. Rep.* 636.

The petition in this case is based upon two propositions of law, which will be discussed in their order.

The first proposition (Petition, p. 2) raises the question whether the adjudication in bankruptcy was "a conclusive determination *as to all creditors* that the bankrupt was insolvent *for the full period of four months* prior to the filing of the petition in bankruptcy."

If this legal proposition needs to be stated, under the practice in this Court, with anything like the precision of an assignment of error, it does not raise a material question. Petitioner is not at all concerned with the question whether the adjudication of insolvency was a conclusive determination as to *all* creditors of the bankrupt, but is concerned only with the question whether that adjudication was a conclusive determination as to it, and it alone, that the bankrupt was insolvent for four months next prior to the filing of the petition in bankruptcy.

Many reasons will occur to the Court why it might be conclusive as to some creditor or creditors even though it might not be conclusive as to all creditors. Hence, the question raised is not material here, because it is not confined to or necessarily includes, the petitioner who, upon the Record submitted, is concerned only with its own status.

If the Court will kindly refer to page 9 of the Record, it will appear that petitioner as defendant in the trial court pleaded only the general issue. It did not assert "any title, right, privilege or immunity" under any provision of the Bankruptcy Act, and there was no decision in the lower court or in the Supreme Court of the State of Michigan "against the title, right, privilege or immunity specially set up or claimed" by the petitioner. In fact, petitioner was not entitled to raise that question under its plea, under

Michigan Circuit Court Rule 7 (b), in force at the time of joining issue and the trial of this case, which reads as follows:

> "An affirmative defense, * * * and any defense which by other *affirmative matter* seeks to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration, must be plainly set forth in a notice added to the defendant's plea."

Plaintiff, upon the trial of that case, naturally and properly relied upon the determination of the bankruptcy court that the St. Louis Chemical Company was insolvent during the four months prior to the date of filing the petition in bankruptcy. If petitioner as defendant claimed the right to litigate that question in that court, it was bound, under the rule quoted, to give notice of that contention in order to enable the plaintiff in that case to prepare to meet that issue. And in the absence of any such notice, the ruling of the trial court and of the Supreme Court of Michigan was correct, in any event.

If this Court passes the objections raised and considers the first proposition of law raised in the petition in this case (p. 2), then we respectfully assert that the finding of facts by the Special Master and its affirmance by Judge Swan, followed by the adjudication upon those specific facts, was conclusive against this petitioner upon the proposition that the St. Louis Chemical Company was insolvent during the four months in question, because during that four months this petitioner was a creditor of the insolvent company holding moneys in violation and in fraud of the provisions of the bankruptcy act. And this proposition is well illustrated by the provision of the bankruptcy act that where a creditor has received a voidable preferential payment which has later become "liquidated by litigation," such creditor, if compelled to repay the moneys received, is allowed 60 days after such liquidation by litigation to prove his claim as a creditor against the bankrupt's estate.

Bankrupt Act, Sec. 57 N.

In other words, the creditor is considered a creditor during the bankruptcy proceedings, but holding or owing moneys belonging to the estate which he is or may be subsequently compelled to repay.

Accordingly, it has been held, as applied to the case at bar, that petitioner was a creditor of the bankrupt during the time of the bankruptcy proceedings, and was so far a party to those proceedings as to be bound by the facts adjudicated by the bankruptcy court.

Bear vs. Chase, 99 *Fed. Rep.* 920, 923-4.
In re Pekin Plow Co., 112 *Fed. Rep.* 308, 309, 310.
In re Am. Brewing Co., 112 *Fed. Rep.* 752, 758.

Citing,

In re Skinner, 97 *Fed. Rep.* 190.
In re Henry Uhlfelder Clothing Co., 98 *Fed. Rep.* 409.
In re McKinley, *Fed. Cas. No.* 864.
Shawhan vs. Wherritt, 7 *How.* 627.
In re Wallace, *Fed. Cas. No.* 17, 094.
In re Banks, *Fed. Cas. No.* 958.
Morse vs. Godfrey, *Fed. Cas. No.* 9, 856.
Rayl vs. Lapham, 27 *Ohio St.* 452.
Lewis vs. Sloan, 68 *N. C.* 557.
Thornton vs. Hogan, 63 *Mo.* 143.
In re Frazier, 117 *Fed. Rep.* 746, 748-9.
In re First Nat. Bank, 152 *Fed. Rep.* 64, 69-70.
Cook vs. Robinson, 194 *Fed. Rep.* 785, 790-1.
Hackney vs. Hargreaves Bros. (*Neb.*), 99 *N. W. Rep.* 675, 678-9.
John Silvey & Co. vs. Tift (*Ga.*), 31 *S. E. Rep.* 748, 750.

In Bear vs. Chase, supra, the Circuit Court of Appeals states the rule as follows at pages 923-4:

> "Upon the adjudication of the bankrupt, all creditors became parties to the bankrupt proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused."

In the same case, at page 926, the Court uses the following language in reference to the relation existing between Federal and State Courts, and in reference to the finality of the decision of the bankruptcy court:

> "As to many matters the two courts have concurrent jurisdiction, and can and should work in the utmost harmony; but as to others, among them the right to determine what are acts of bankruptcy and

> who are bankrupts, the United State District Court's jurisdiction is superior to, and exclusive of, that of the state court, and, as to all questions necessarily involved in such exclusive jurisdiction, the federal, and not the state, courts should proceed and take charge of and administer the bankrupt's estate. Here, to illustrate, the district court declared the attachment proceedings in the state court to be acts of bankruptcy, and null and void, and by reason thereof adjudicated the bankruptcy. This ruling cannot be reviewed or called into question by the state court, and is absolutely conclusive as against all creditors of the bankrupt, until reviewed or reversed in the proper federal tribunal, i. e., this court, and its action is here approved and affirmed."

In In re Pekin Plow Co., supra, the Circuit Court of Appeals uses the following language at pages 309-310:

> "The proceeding in involuntary bankruptcy is a suit between the bankrupt and all his creditors. Section 18, subd. 'b,' of the bankruptcy act, provides that:
>
> "The bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow."

Subdivision "d" of the same section provides that,

> "if a bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition,"

the judge shall hear and determine the issue so made.

Section 59, subd. "g," provides that:

> "A voluntary or involntary petition shall not be dismissed by the petitioner or petitioners, either for want of prosecution or by consent of parties, until after notice to the creditors."
>
> "These and many other provisions of the act evince an unquestionable intent on the part of congress to make all creditors of the bankrupt parties to the proceeding when once instituted. The effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to

the payment of his debts pro rata and equally. * * *

"From the foregoing provisions of the act, it in our opinion clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of his creditors."

In In re Am. Brewing Co., supra, the Circuit Court of Appeals uses the following language at pages 757-8:

"Supposing it should be held that the adjudication is not conclusive upon all the matters charged in the petition, still it must be conceded to be presumptively true as to all those allegations. If a judgment does not conclude anything even prima facie, it would be of little use to enter one. * * *

But we are of opinion that the decision of the referee was correct, in holding that the adjudication in bankruptcy was binding upon the appellants, and conclusive upon the question of insolvency. The appellants, as well as the brewing company, were essentially parties to the petition. * * * To say now that the judgment is not binding upon the question of insolvency is to run counter to well-established principles of law applicable to judgments. If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not."

In In re Frazier, supra, the Court uses the following language at pages 748-9:

"The moment the petition is filed the proceeding is in rem. It, in legal effect, sequesters all of his property interests for the benefit of all of his creditors, pari passu, as if seized under attachment or a writ of execution. His whole estate passes into custodia legis. Eo instante every creditor of the bankrupt becomes an adversary party in a legal proceeding for the appropriation of the property of the bankrupt,

and stands as a creditor seeking the aid of the court of exclusive jurisdiction. * * *

The moment of the institution of the proceedings in bankruptcy, such creditors, as already stated, by operation of law, became adversary parties."

In In re First Nat. Bank, supra, the Circuit Court of Appeals, in passing upon the question of the finality of the determination of the bankruptcy court that the Widell Company was principally engaged in manufacturing, which fact was essential to the jurisdiction of the court and the validity of the adjudication, uses the following language (pp. 69-70):

"The court had the same jurisdiction to decide the issues between the parties, whether the Widell Company was or was not principally engaged in a manufacturing pursuit. The only difference the determination of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not thus occupied it should have rendered judgment against them. The jurisdiction and the duty to decide remained in the court, whichever way it was its duty to determine the issue. The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some direct proceeding. The filing of the petition for the adjudication and the service of the order to show cause upon the Widell Company conferred plenary jurisdiction of this proceeding upon the court below. The power was thereby vested in, and the duty was imposed upon it, to decide whether or not the Widell Company was principally engaged in a manufacturing pursuit, because the determination of that issue was indispensable to the adjudication in bankruptcy. The adjudication is therefore a demonstration that the court below adjudged that the Widell Company was thus engaged, since it could not have lawfully made the adjudication without such a decision. That judgment, therefore, conclusively estops the complaining creditors here and everywhere from

proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated n some direct proceeding."

In re First Nat. Bank, 152 *Fed. Rep.* 64, 69-70.

Citing,

Dowell vs. Applegate, 14 *Sup. Ct.* 611.
Foltz vs. St. Louis & S. F. R. Co., 60 *Fed.* 317, 319.
Board of Commissioners vs. Platt, 79 *Fed.* 567, 570.

In Cook vs. Robinson, supra, at pages 790-1, the Circuit Court of Appeals lays down the rule as follows:

"Now, the creditors of the bankrupt became parties to the proceeding to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. * * *

"Being parties to the bankruptcy proceedings, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment; otherwise there would be no end to controversy as to these matters, as every creditor would claim the right to be heard by independent suit. As was said in Re American Brewing Co., 112 Fed. 752-758, 50 C. C. A. 517, 523:

"'If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not.'

"And it has been held that the adjudication in bankruptcy, until avoided by direct proceeding, is as binding and conclusive upon the bankrupt and the creditors as much so as a judgment inter parties on due hearing in a court of competent jurisdiction. In re Hecox, 164 Fed. 823-825, 90 C. C. A. 627. See, also, In re First National Bank (C. C. A. 8th Ct.), 150 Fed. 64-70, 81 C. C. A. 260, 11 Ann. Cas. 355."

Precisely the same principle was applied in behalf of a creditor, as follows:

> "The proceeding against the Henry Ulfelder Clothing Company was not one of which creditors were, upon the facts admitted by the pleadings therein, entitled to notice, under subdivision d of section 59 of the bankruptcy act. Any creditor had the right, however, to voluntarily appear and join in the petition, or to be heard in opposition thereto (Bank Act, sec. 59, subd. f), and those not appearing were, in contemplation of law, represented by the bankrupt, and therefore concluded as to all matters directly in issue and determined by the decree. It was held in Candee vs. Lord, 2 N. Y. 269, that a judgment obtained, without fraud or collusion, against a debtor, 'Is, upon all questions affecting the title to his property, conclusive evidence against his creditors to establish (1) the relation of creditor and debtor between the parties to the record, and (2) the amount of the indebtedness.' And in answer to the argument that creditors not parties to the suit in which such judgment was rendered were not in privity with the defendant debtor, and therefore not estopped thereby, the court said:
>
> "'We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and pay them, made him, to that extent, the representative of all his creditors who should seek the satisfaction of their demands out of his property. So far, at least, they are in privity with, and claim under, their debtor.'
>
> "And, upon precisely the same principle, the decree in the involuntary proceeding against the Henry Ulfelder Clothing Company, which, in legal effect, determined that at the date of the commencement of such proceeding the bankrupt was indebted to the petitioning creditor upon the identical claim now filed with the referee, and for its full amount, because such claim is indivisible, is conclusive upon all other creditors in the administration of the estate of the bankrupt."
>
> *In re Henry Ulfelder Clothing Co.*, 98 *Fed. Rep.* 409, 413.

In Hackney vs. Hargreaves Bros., supra, the rule is stated as follows, at page 678:

"The defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purpose were necessarily parties to the bankrupt proceedings."

In John Silvey & Co. vs. Tift, supra, the Court uses the following language, at page 750:

"An adjudication in bankruptcy is in the nature of a proceeding in rem, and the adjudication is in the nature of a decree in rem, so far as it fixes the status of the defendant in the proceeding as a bankrupt. Considered in the light of a proceeding in rem, the res involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All persons are bound by the adjudication to that effect; and this was true under the act of 1867 as well as under the act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a competent court, unless it appeared that the decree was void in form, or that due notice was not given. * * *

"There are two kinds of actions which are commonly spoken of as proceedings in rem. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant, but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class of actions, which are strictly in rem, the judgment is against the property alone. The other class of proceedings in rem are proceedings to determine the status of some person or subject-matter. Such are judgments of outlawry, appointments of guardians, administrators, etc., where the proceeding is to determine status, not title to property. The res which make a proceeding in rem is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment in rem has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose."

In the case at bar, the trial court and the Supreme Court of Michigan held only, in this respect, that the adjudication in bankruptcy finally determined the question of insolvency during the period alleged in the petition in bankruptcy, and the trial court submitted to the jury the question whether the Gratiot County State Bank received the money in question with such notice as to make the preference voidable. In fact, as we shall hereinafter point out, the court submitted the case to the jury upon the theory that plaintiff could not recover in this case unless the notice and conduct of the Gratiot County State Bank in receiving the moneys in question were such as to make the bank guilty of bad faith (Rec. pp. 294, 300, 302-3).

At page 2 of the Petition, counsel state that the report of the referee states that the petition (in bankruptcy) "alleges the payment of preferences within four months of the filing of the petition to various parties, these parties so receiving alleged preferences" (Rec. pp. 322 and 323); then follow the names of the seven creditors mentioned in the petition other than the petitioner here.

The foregoing language is incorrect and misleading. The language of the report referred to is as follows (Rec. pp. 322-3):

> "The petition alleges the insolvency of the alleged bankrupt for more than four months prior to the filing of the same, and also alleges the payment of preferences within four months."

As stated, this language was followed by the finding of the Master in Chancery that (Rec. p. 328):

> "During such four months period the corporation paid out the moneys alleged in the petitioning creditors' petition and these payments were preferences within the meaning of the Acts of Congress relating to bankruptcy,"

thereby showing conclusively that the master in chancery found that all of the preferential payments alleged in the petition in bankruptcy were made as therein stated, including the payments to the Gratiot County State Bank.

The four cases cited by counsel for petitioner at pages 9 and 10 of their brief in support of their contention, are either not in point or make for the respondent.

Manson vs. Williams, 213 U. S. 453, is not in point because this court in that case distinctly held that the adjudication against the partnership was not res adjudicata as to Henry Hudson because at that time his property was in the hands of trustees and they were not entitled to be heard in the bankruptcy proceedings.

The case of Tilt vs. Kelsey, 207 U. S. 43, is not in point because in that case this court held that the adjudication of the New Jersey court that Tilt was, at the time of his death, a resident of New Jersey, was not conclusive upon the State of New York, which was a stranger to the proceedings.

The case of In re McCrum, 214 Fed. Rep. 207, is not in point because the decision in that case turned upon the question whether the assignment made by the bankrupt prior to his adjudication was an assignment of all or only a portion of his property, and the adjudication in the bankruptcy court was not definite and conclusive upon that proposition.

The case of John Silvey & Co. vs. Tift (Ga.), 51 S. E. Rep. 748, is in point in favor of our contention in this case, as the portions of the opinion hereinbefore quoted, and other portions of the opinion, readily show.

For these reasons we respectfully submit that even if the first proposition of petitioner properly raises a Federal question, which we deny, there is no merit in it because the trial court held, so far as that first proposition is concerned, that the adjudication in bankruptcy determined the question of insolvency, and submitted the case to the jury upon the question of notice to petitioner and of participation by it in the fraudulent conduct of the bankrupt in making the preferential payments.

The second proposition (p. 4) raises the question whether there was any evidence to be submitted to the jury upon the question whether petitioner had reasonable cause to believe that the payments made to it by the debtor would effect a preference.

In the first place, we call the attention of the court to the fact that in the trial court petitioner (defendant there) insisted that it had the right of off-set, provided for by the bankruptcy act, and that it was protected by the application of the doctrine of set-off.

The trial court submitted the case to the jury, in accordance with requests preferred in behalf of petitioner, upon the question of notice and charged the jury specifically and clearly and in so doing used the following language (Rec. p. 294):

> "But in order to entitle the plaintiff to recover, he must not only show actual insolvency and intent to make preferential payments—the questions that I have just determined for you—but he must show by a preponderance of the evidence that the moneys were received by the defendant bank under such circumstances as charges the bank with bad faith."

Again, referring to the same subject and instructing the jury more specifically as to its duty to determine whether all or any of the payments made to and received by petitioner were received by it in good faith, the Court used the following language (Rec. pp. 300-301):

> "Now, gentlemen of the jury, I think I ought to instruct you in that connection that it does not follow that because you may find for the plaintiff, if you do, that that shall be the entire amount or the exact amount of your verdict, because if you find that any of these amounts were put in the bank at a time when the bank was acting in good faith, if you find such a state of facts as that existed, and then find there came a time when the bank was not acting in good faith and that the other amounts were not received in such a way, then you will readily see that the amounts that were received in good faith would not be charged up to the bank and you would have to make your own computation. If you reach such a time as that and desire any more figures, you may come in and ask for the figures and the dates and all those things, if you desire it at any time."

Again, referring to the same subject, when the jury returned for further instructions and stated in substance that they did not understand the instructions of the Court on the question of their right to return a verdict for all or less than the sum total of all of the preferential payments which were claimed, the Court further instructed the jury (Rec. pp. 302-3):

> "You could not find a greater amount for the plaintiff than that (referring to the amount agreed upon by counsel as the total amount claimed by the

plaintiff). You might find a lesser amount providing you find under the evidence that some of the payments were received in good faith and there came a time afterwards when some of them were received in bad faith. As to whether there is any place to divide that or not, that is for you to say. I don't say that there is or is not. That is a matter of fact for you, but if you find such a state of facts, then you have a right to leave out such payments from your verdict as you find were received in good faith."

Now, in the light of the foregoing excerpts from the charge of the trial court it is perfectly evident that the jury, before it could render a verdict in favor of the plaintiff, had to and did pass upon the question as to whether or not petitioner was acting in bad faith in receiving the payments which were made to it, and necessarily had to find that it acted in bad faith in receiving each and every payment for which judgment was recovered against it in this case.

Under these circumstances, we respectfully submit that in view of the fact that this petitioner has not raised in this court any question as to the propriety of the submission by the trial court of the proposition of its bad faith in the transactions in question, it thereby conclusively admits that it was proper for the Court to submit that question to the jury. And the jury having found against petitioner on that issue, it necessarily follows that petitioner can not in one breath admit that it was properly found guilty of bad faith and in the next breath be heard to say that it was not on notice as required by the bankruptcy statute in order to make it subject to the avoidance of the preferential payments which were made to it.

If, however, the Court deems it proper to further consider the second proposition raised by petitioner, we appreciate the fact that that consideration necessarily involves an examination and consideration of the entire printed record, and in view of the length of that record we herewith submit a somewhat extended statement of and refer to the facts contained in the record for the purpose of demonstrating that beyond peradventure this petitioner "had reasonable cause to believe that the payments made by the debtor would effect a preference." These facts are as follows:

Prior to May 15th, 1907, the St. Louis Chemical Company was a New Jersey corporation, engaged in the manufacture

and sale of certain chemicals, acids, etc., with its principal place of business located at the city of St. Louis, Michigan (pp. 313-314).

At the time of its incorporation in the state of New Jersey said St. Louis Chemical Company executed its bonds in the sum of $100,000 of which $56,000 were sold to various persons and the remaining $44,000 were retained for a time as treasury bonds (p. 314).

On May 16th, 1905, upon the issuance of said bonds the Security Savings Bank and Trust Company, of Toledo, Ohio, was duly appointed trustee thereof and a deed of trust was executed and recorded by the Chemical Company to the trustee covering all of its real estate and nearly all of its personal property (pp. 326-7), which was also placed on file and kept renewed as a chattel mortgage (p. 150).

The trust deed or mortgage in question did not cover, and was not a lien upon, accounts and bills receivable nor upon the cash of the corporation (pp. 326-7).

On May 15th, 1907, the Michigan corporation of the St. Louis Chemical Company was organized, and its property was stated in its Articles of Association as follows: Cash paid in, $30.00; real estate and plant of the New Jersey corporation, $114,759; accounts receivable of the New Jersey corporation, $11,000; good-will of said New Jersey corporation, $229,311 (p. 344).

The Michigan corporation upon its organization assumed all the debts and liabilities of the New Jersey corporation, consisting of the following: Outstanding bonded indebtedness, $56,000 (p. 344); and other outstanding indebtedness "in large sums of money" (p. 316).

Its annual report of December 31st, 1908, showed as appears by the record (p. 345), that the Michigan corporation had a total of nominal assets of $315,526.89 deducting from which the good-will of the company which was carried upon its trial balance ledger at $242,511.12 (p. 168) left nominal assets of $73,015.77, with a total indebtedness (including the bonded indebtedness of $56,000) of $105,705.65 (p. 345).

And in this connection, it is also to be noted that Henry J. Tuger testified, and no one contradicted him, that on December 31st, 1908, the financial condition of the Chemical Com-

pany was substantially the same as it was on February 26th, 1909, because the conditions hadn't changed (p. 167); and that in the bankruptcy proceedings the Referee found (p. 324), and Judge Swan affirmed the finding (p. 329) that on February 28th, 1909, the Chemical Company had total assets of $30,000 and liabilities of upwards of $88,000 (p. 324).

From the time of its organization and down to the time that the corporation ceased operations the Board of Directors consisted of nine persons, viz: W. H. Cocke, D. E. Harrison, Henry J. Tuger, Cass T. Wright, John W. Pfeifler, C. H. LaFlamboy, F. C. Henry, William Hugh and Max Lowenstein (pp. 126-7, 129).

Upon the organization of the Michigan corporation it became necessary to raise money for working capital and the Board of Directors authorized and empowered its officers to make loans where they could (p. 316).

The directors arranged that they should each raise $2,500 of the moneys needed for such working capital (pp. 53, 127).

They raised the money as follows:

Tuger loaned the company $2,500 and took its note for that amount (p. 128), and put that note in the Gratiot County State Bank, and put his own note for a like amount in the same bank, and both notes were renewed from time to time (p. 128).

Harrison and Lowenstein guaranteed the company's note for $5,000 at the Gratiot County State Bank (p. 129).

Henry raised his $2,500 by guaranteeing the company's note for that amount at the Commercial Savings Bank of St. Louis, of which he was director (pp. 53, 130).

Hugh furnished $2,500 and took the company's note for that amount (p. 130).

Wright procured $5,000 for the company by getting his aunt, Mrs. F. N. Wright, to loan that amount to the company and take its note without endorser for that amount (pp. 131, 181, 185).

LaFlamboy was a director of the State Savings Bank of

Stanton and $4,500 was obtained by the company on its note for that amount given to that bank and endorsed by LaFlamboy, Cocke and Pfeifler (pp. 179-180).

The remainder of the money was obtained from the Old National Bank of Grand Rapids, and Cocke, Pfeifler and LaFlamboy endorsed or guaranteed the payment of that paper (p. 132).

Each director of the company saw to it that his proper share was provided for the company, in accordance with the agreement, in some manner (p. 132).

The sources of the moneys so raised were the Gratiot County State Bank, the Commercial Savings Bank of St. Louis, the Old National Bank of Grand Rapids, the Stanton Savings Bank, William Hugh, Henry J. Tuger and Mrs. F. N. Wright (p. 133).

"There came a time when the directors (of the company) had furnished their respective shares which they were to furnish under that arrangement" (p. 133).

And in negotiating these various loans the Chemical Company put up as collateral security the $44,000 of bonds remaining over and above the $56,000 of bonds of the New Jersey corporation (p. 133).

Defendant bank held $9,000 of these bonds as collateral to its note of $5,000 as shown by the undisputed testimony of its assistant cashier, Frank M. Thedgar, as follows (p. 44):

> "Commencing with the note of $5,000 given July 16th, 1907, from that time on down our bank had the guarantee of Max Lowenstein and D. Harrison and eighteen bonds of $500 each as collateral, and all subsequent renewals of it had same collateral and guarantors. Our records showed these facts," etc.

Henry J. Tuger testified, and his testimony is uncontradicted, upon the subject of these bonds, as follows (pp. 149-151):

> "* * * at this time the $44,000 of bonds that were collateral to these notes were regarded the same as the other bonds, as an obligation of the company, that is providing they were sold or became in the

possession of any other person; they were regarded in the hands of the banks to whom they had been pledged as collateral as equally as valid, and equally as well secured by the mortgage as any of the $56,000 of bonds; they certainly were; * * * a portion of these $44,000 bonds were pledged by the New Jersey corporation to the Old National Bank of Grand Rapids to secure the paper of the New Jersey corporation; at the time of the re-organization of the New Jersey corporation into the Michigan corporation I think those bonds were still in the hands of the Old National Bank of Grand Rapids as originally placed there; the obligations of the New Jersey corporation to the Old National Bank were not paid at the time of the re-organization of the new company, and retired, and the bonds remained there, as I understand it; I do not remember how many bonds the Old National Bank held; the amount of the indebtedness of the New Jersey corporation to the Old National Bank was, I think, around $15,000 or $20,000, and I think the amount of the bonds pledged to it were in excess of the amount of indebtedness."

The notes so given by the Chemical Company were renewed from time to time and remained nearly all unpaid in the forepart of 1900 (pp. 133, 62-86).

No one outside of the banks had any guarantor of his paper (p. 101).

In the latter part of 1908 the financial affairs of the company remained in a precarious condition. If its condition did not materially change from that time until February 26th, 1909, and Henry J. Tuger testified without contradiction that it did not (p. 167), then the Chemical Company was insolvent at that time. In any event, its total nominal debt-paying assets exceeded but little the amount of its debts and it could not pay as men ordinarily do.

With its financial condition in this shape, the directors of the Chemical Company considered the situation and agreed upon a course of action. The date of this agreement does not definitely appear, but it was shown to have been about December, 1908, or January, 1909, (pp. 133-4, 183), and it was undoubtedly November 30th, 1908 (pp. 183, 335-6). Mr. Cocke, the President of the company, made a report as to the condition of the company (pp.

182-3), and that "It was going to be difficult to keep the company afloat."

Accordingly, it was arranged that the company was to collect in moneys and pay off these notes endorsed or guaranteed by the directors and retire the bonds collateral thereto (pp. 133-4).

This plan of the company was stated so clearly by Henry J. Tuger, one of its directors and the Vice-President of defendant bank, that we insert his testimony on that point as follows (pp. 134-40):

> "Q. Now, that was the arrangement made by the directors of that company, was it not? A. It was discussed by the members, but no formal action was taken; I understood that they were going to follow out those lines though that is all that I know; that the company was going to pursue that course.
>
> Q. And you understood that it started upon and continued that course, did you not? A. I understood that they would, yes.
>
> Q. And you understood, did you not, that from time to time as you received payments on your note that these other notes secured by these bonds were being taken care of at the same time? A. I didn't know exactly what they paid but I supposed that that was the case. That was my understanding; and that I understood was the course which the company had determined upon to pursue.
>
> Q. And your understanding was, and is, is it not, that whenever the company made these payments in February and March, 1909, upon those notes that we have been referring to as being secured by a part of the stock of $44,000, that those payments were being made by the company for the purpose of paying off and getting rid of those notes, and taking up the bonds collateral thereto? A. Yes, sir.
>
> Q. And it was also your understanding, was it not, that it was the purpose of the company and the intention of the company to pay off those debts as secured by those bonds and then go to the question of paying off the general unsecured creditors? A. Yes, sir.
>
> Q. Was a part of the policy of that company was it not at that time? A. Yes, sir, as I understood it.

Q. And agreed upon by the directors? A. Yes, sir—well, in a way.

Q. In an informal way? A. Yes, sir, no formal agreement at all.

Q. What do you say as to whether or not that was the talk of the directors that they would pursue that course? A. Yes, sir. I mean that it was not in the form of a resolution and placed upon the record of the company, but it was agreed in a verbal way that that should be the policy of the company; there didn't anyone object that I remember of.

Q. And all the directors, as you recollect, consented to it? A. If they were all there; I think they were at the time; I don't remember.

Q. And they aproved of the following of that course, did they not? A. Yes, sir.

Q. And it was in accordance with that arrangement, and that agreement, that the company was to pay off the notes secured by the bonds out of the $44,000 of bonds, that these various payments upon these notes secured by the bonds were made according to your understanding? A. Yes, sir.

Q. And was there any talk there as to how long it would take to pay off those notes secured by those bonds, or how quick they expected to be able to do it? A. I think there was; I cannot remember the talk now. It seems as if the management reported these things from time to time and explained to the board how we could wipe out this indebtedness.

Q. I notice here, by the evidence already in the case, that the Mrs. Wright note didn't get any payment upon it; do you know how that came to be overlooked? A. No, sir.

Q. But the arrangement and policy of the company was to pay such amounts as would keep the payments about proportional upon each of the notes secured by the bonds, taking into consideration the amounts of the notes, was it not? A. I don't remember that anything was said about that.

Q. But to pay them off in the same general way proportionate or otherwise from time to time until you got them retired. A. Yes, sir.

Q. And take up those bonds? A. Yes, sir.

Q. What do you say as to whether or not it was not also talked there that after you got those all retired and all paid off your company would then

take up the problem of paying off the general creditors of the company? A. Yes, sir.

Q. According to the course of your business it was up to the management to refuse payment of claims outside of these secured by the bonds, if anybody did, was it not? A. Yes, sir.

Q. You do know, however, that it was the understanding and agreement of the Board, and the understanding and agreement of the management of the company, that first and foremost they were to pay off and retire those notes secured by these bonds, and then afterward try and take care of the general creditors? A. That was the general understanding; yes, sir.

Q. Was that the general talk? A. It was never talked, but the management proposed that, and it was acceptable to others.

Q. To the directors? A. Yes, sir.

Q. And that was the policy that the company sought to carry out, was it not? A. That was what I understood.

Q. Who was the manager at that time? A. Mr. Cocke was general manager and president.

Q. Whether or not he proposed to the board—said to the board—that it was his idea that the best thing to do was to collect in your assets as quickly as possible, pay off these notes secured by the bonds of the company and retire those bonds? A. I think that was his sugestion; that was the substance of what he suggested to the board.

Q. And you say that the board fell in with that idea, and approved of it? A. There was no objection to it raised. I understood that from that time on the company pursued that policy. I cannot fix the time that that arrangement was made.

Q. In other words your understanding is, that that arrangement was made before the company began to make these payments of January, February and March, upon these notes secured by these bonds? A. Yes, sir.

Q. And your understanding also is, that payments made upon these notes during January, February and March, referring to the notes secured by the bonds, were made in pursuance of, and for the purpose of, carrying out that arrangement of the board of directors? A. Yes, sir."

Following out this plan as thus agreed upon, the company refused to pay its debts as they were presented to it, except its labor and running expenses, its freight bills and certain drafts drawn with bill of lading attached (which it had to pay to get materials necessary to continue business) and collected in its moneys and sold its products and made payments upon the notes endorsed or guaranteed by the directors *save only not a dollar was paid on the Mrs. F. N. Wright note*, although her note was as much secured by a part of the $44,000 of bonds as any of the other notes (pp. 131, 182).

In carrying out this plan payments were distributed among the holders of the notes endorsed or guaranteed by the directors, keeping them in a general way in about equal proportions, and in so doing all payments were made through the defendant bank by checks on the Chemical Company's account in that bank, and among those are the payments in question in this case and for which plaintiff recovered a judgment as preferential payments under the Bankruptcy Act, as follows (pp. 43, 62-83):

$700 on February 26th, 1909.
$200 on March 4th, 1909.
$200 on March 6th, 1909.
$500 on March 12th, 1909.
$200 on March 12th, 1909.
$500 on March 13th, 1909.
$400 on March 13th, 1909.
$200 on March 20th, 1909.
$400 on March 23rd, 1909.
$500 on March 23rd, 1909.
$100 on March 24th, 1909.
$442.39 on March 31st, 1909.

The defendant bank was not only on notice as to the financial condition of the Chemical Company, but the stockholders, officers, business management and business dealings between them were such that no one can escape the conclusion that the bank and its managing officers were parties to the scheme to take care of the directors of the Chemical Company at the expense of Mrs. Wright and the general creditors for whose benefit this action was commenced and is prosecuted.

A. B. Darragh, the president of defendant bank (p. 225), was the owner of 375 shares of stock in the Chemical

Company (pp. 244, 345), besides being the owner of some of its bonds (pp. 333-5).

Henry J. Tuger, the Vice-President of defendant bank (p. 250) and a member of its Board of Directors (p. 126) and its examining committee (p. 239), was the owner of 591½ shares of Chemical Company stock (pp. 345-6), and a director of that company from the time of its organization in 1907 until after the payments in question (p. 126). He was also the owner of $2,500 of the bonds of the company (p. 150).

B. A. Church, cashier of defendant bank (p. 245), and a director therein (pp. 250-1), was the owner of 200 shares of stock in the Chemical Company (p. 345), and his wife was the owner of 50 shares therein (p. 249, 345), and he was looking after his interests in the company (p. 249).

D. E. Harrison, a director of defendant bank (p. 145), was the Vice-President of the Chemical Company (p. 145), and one of the directors from the time of its organization in 1907 until it failed in 1909 (pp. 126-7), and the owner of 1895 shares of its stock (p. 345).

B. A. Church, the cashier of defendant bank, was present at the first stockholders' meeting at the organization of the Chemical Company in 1907 (p. 254), heard the Articles of Incorporation read (p. 254), and those articles showed that $30 was paid in in cash (p. 344) and the good-will of the New Jersey corporation of the same name was put in a $229,211 (p. 344). He attended the stockholders' meeting from time to time (pp. 252-3) and at those meetings the secretary of the company made verbal reports of the financial condition of the company (p. 253).

Henry J. Tuger, Vice-President of defendant bank, and director of the Chemical Company, testified, and no one contradicted him, that if the Chemical Company was insolvent in March, 1909, it was insolvent in December, 1908, as the conditions hadn't changed (p. 167).

Church, Tuger and Harrison, the first two, respectively, cashier and vice-president, and all three directors, of defendant bank, knew of the financial condition of the Chemical Company from its organization in 1907 until it collapsed in 1909.

The Chemical Company being aparently "on its last legs," a meeting of the Board of Directors was held November 30th, 1908, seven of the nine directors being present (p. 148); a verbal report of the financial condition of the company was presented (pp. 148, 335-6); and it is obvious from the record that it was at this meeting that the president of the company, Cocke, reported that it was difficult or impossible to keep the company afloat (p. 183), and the scheme was adopted of paying and retiring the paper of the company of which the directors of the company were either endorsers, guarantors or holders (pp. 133-4).

In accordance with that scheme the following steps were agreed upon and taken:

(a) Notices were at once sent to the holders of the $56,000 of bonds that the company could not meet the interest on its bonds (pp. 335-6), obviously referring to the interest which had come due June 1st and which was to come due on December 1st, 1908 (p. 335).

(b) Those notices contained the statement that the directors of the Chemical Company were, themselves, heavy bondholders (p. 336), and this statement evidently included not only the bonds owned by the directors but also that part of the $44,000 of bonds which they held as security for the moneys which they had raised to furnish working capital for the company.

(c) The company refused to pay its notes, debts and drafts to a large amount drawn on it through the defendant bank as follows:

1908:
December 7th, draft of $16.78 (p. 46).
December 10th, draft of $36.16 (p. 47).
December 17th, draft of $769.55 (p. 47).
December 18th, draft of $87.92 (p. 47).
1909:
January 4th, draft of $420.87 (p. 48).
January 4th, note of $420, dated October 5th, 1908, due 90 days after date, payment refused (p. 51).
January 11th, draft of $316.14 (p. 48).
January 15th, draft of $144.60 (p. 48).
January 25th, draft of $223 (p. 48).
January 27th, draft of $100 (p. 48).
January 27th, draft of $50 (p. 48).

February 18th, not of $550 and interest protested (pp. 48-9).
March 9th, draft of $17.05 (p. 49).
March 9th, draft of $2761.65 (p. 49).
March 20th, draft of $360 (p. 49).
March 20th, draft of $183 (p. 49).
March 22nd, draft of $262.28 (p. 49).

Note of $551.07, dated November 20th, 1908, due March 20th, 1909, with interest, protested at defendant bank (p. 50).

Sight draft of $306, dated March 25th, 1909, returned April 1st, 1909 (p. 50).

Sight draft of $49.64, dated March 24th, 1909, returned March 30th, 1909 (p. 50).

Note due in 60 days given to Harde Brothers Mining Co. for $1247.35. Protested by defendant bank for non-payment and returned (Rec. p. 51),

Note dated November 20th, 1908, given to Peoples' State Bank, Detroit, amount $562.27, due March 20th, 1909, returned March 22nd, 1909 (Rec. p. 49).

Note dated October 5th, 1908, due in 90 days payable at defendant bank returned to the party from whom received (Rec. p. 51).

(d) A considerable number of drafts of large amounts were drawn upon and presented to and paid by the Chemical Company through defendant bank during this period by or through the Cleveland National Bank (pp. 110-11), but it was afterwards shown that these drafts were drawn with bills of lading attached (p. 192-3, 196-8), so that it was necessary to pay the drafts in order to obtain the shipments, which were necessary to convert the company's stock on hand into ready money.

(e) The moneys of the Chemical Company were gotten together in accordance with the plan agreed upon and placed in the Gratiot County State Bank for the purpose, and payments made upon the paper guaranteed or held by the directors as follows (pp. 62-86):

1909:

February 26th,	$700, Gratiot County State Bank (p. 62).
	$1,000, Old National Bank of Grand Rapids (pp. 52, 62).
	$200, Henry J. Tuger (p. 62).
March 4th,	$200, Gratiot County State Bank (p. 62).
March 5th,	$100, Henry J. Tuger (p. 62).
March 6th,	$200, Gratiot County State Bank (pp. 68-9).
March 8th,	$200, Henry J. Tuger (p. 69).
	$300, Commercial Savings Bank (p. 70).
March 12th,	$81.67, State Savings Bank, Stanton (pp. 71, 74-5).
	$500, Gratiot County State Bank (p. 85).
	$400, Commercial Savings Bank (p. 75).
	$200, Henry J. Tuger (p. 76).
	$200, Gratiot County State Bank (p. 76).
	$227.36, LaFlamboy (p. 77).
March 13th,	$500, Gratiot County State Bank (p. 77).
	$500, State Savings Bank, Stanton (p. 78).
	$300, Henry J. Tuger (p. 79).
March 15th,	$400, Gratiot County State Bank (p. 80).
	$600, State Savings Bank, Stanton (p. 80).
	$300, Henry J. Tuger (p. 80).
	$400, Commercial Savings Bank (pp. 80-1).
March 20th,	$300, State Savings Bank, Stanton (pp. 81-2).
	$200, Gratiot County State Bank (p. 82).
March 23rd,	$500, Gratiot County State Bank (p. 82).
	$400, Gratiot County State Bank (pp. 82-3).
March 23rd,	$100, Gratiot County State Bank (p. 83).
March 31st,	$442.39, Gratiot County State Bank (p. 83).
April 10th,	$250, State Savings Bank, Stanton (p. 83).
April 23rd,	$300, State Savings Bank, Stanton (pp. 84-5).
May 1st,	$305.12, State Savings Bank, Stanton (p. 85).

1909:

May 3rd,	$500, William Hugh (p. 85).
May 11th.	$400, William Hugh (p. 86).

(f) The foregoing payments were made by checks drawn upon the Gratiot County State Bank and the checks were produced, identified and offered in evidence upon the trial (pp. 62-85).

Frank M. Thedgar, the assistant cashier of the defendant

bank, knew of these various payments at the time and testified in that respect, as follows (p. 51):

> "I think that about February 26th, 1909, the Chemical Company commenced paying other banks that held its paper by checks drawn upon its account at our bank. I knew of that at the time."

The record shows that during the time the preferential payments were being made to the Petitioner, it was not only returning collections and claims against the St. Louis Chemical Company in large numbers and amounts but actually protesting notes for non-payment by that company and turning its unpaid obligations over to local attorneys for forced collection. (Rec. pp. 46, 47, 48, 49).

The Petitioner actually held in its bank for collection two notes of $15.00 each given by that company to Fred Biddlecomb, a local resident of the City of St. Louis (where it did business), from on or about December 28, 1908, to July 28, 1909, when the notes were returned to the owner as uncollected. It is to be noted that it was during this time that the Petitioner actually received from bankrupt the payment of the preferences recovered in this case. (Rec. pp. 267-8).

As we have hereinbefore pointed out, B. A. Church, the cashier of defendant bank, was present at the birth of the corporation, knew that its financial statement was inflated from the beginning by upwards of $229,000 under the guise of "good-will of the New Jersey corporation" in order to give the company a respectable financial appearance, was present at various meetings of the stockholders of the corporation and heard the financial affairs of the company reported and discussed, and naturally and necessarily knew that its financial death was imminent.

Frank M. Thedgar, the assistant cashier of defendant bank, knew and was bound to know that the Chemical Company was refusing to pay large amounts of its debts due to general creditors, turning down drafts drawn on it through defendant bank and allowing its paper to go to protest, while it was paying the paper guaranteed or held by the directors. He says in that respect (p. 51):

> "I think that about February 26th, 1909, the Chemical Company commenced paying other banks that

held its paper by checks drawn upon its account at our bank. I knew of that at the time."

Thedgar also knew that while the payments were being made by the Chemical Company upon the note held by defendant bank (pp. 97-8), the bank held a note of $2,500 against Tuger and that Tuger held a note for the like amount against the Chemical Company and that as fast as payments were made upon Tuger's note against the company he, in turn, applied those payments upon the note which the bank held against him (pp. 98-9). And he also knew at the same time that payments were being made in like manner upon the note of the Chemical Company held by the State Savings Bank of Stanton (p. 100).

In other words, he knew that this paper held by the bank was being taken care of while the debts of the general creditors were being refused from day to day.

Thedgar and the cashier of the bank were bound to know that when the Chemical Company had owed it $5,000 which it renewed from time to time for nearly two years without having paid a dollar thereon, and was repudiating payment of interest on its bonds, and in such a feverish haste to pay off its debt to defendant bank that upon three different occasions it made two payments in one day (p. 43), there was something rotten in the State of Denmark.

When Thedgar was asked whether it was according to the business of the Chemical Company to make two payments upon one note upon the same day he gave the evasive answer (p. 76):

"Well, that is a hard question for me to answer."

But Henry J. Tuger, experienced banker and business man that he is, met the question more frankly, as follows (pp. 171, 178):

"Q. According to your experience as a banker and business man and according to your observation such manner of payment was entirely out of the ordinary, were they not? A. Yes, it might have been out of the ordinary.

Q. Would you regard the making of two payments in one day as unusual? A. Why, I don't know; I suppose it would be unusual."

Henry J. Tuger, the vice-president of defendant bank, was present at the inception of the plan of the Chemical Company to make preferential payments upon the notes guaranteed and held by the directors of that company and knew that it was being carried out as agreed upon. He knew and was bound to know that the Chemical Company was at that time insolvent, as determined by the adjudication of the Federal Court (p. 328).

The testimony is undisputed that A. B. Darragh, the president of defendant bank, left for Washington early in December, 1908, so as to be there on the first Monday in December and was away until about the 6th of March and after that went to St. Louis (p. 227). And the testimony also shows that during that time Henry J. Tuger was the vice-president of defendant bank and in the absence of Mr. Darragh looked after the interests of the bank as president more or less.

> "He performed the duties of president during the absence of Mr. Darragh when occasion arose" (p. 250).

While Henry J. Tuger was thus acting as president of the bank at a time previous to any of the payments in controversy in this case, on February 8th, 1909, at a regular meeting of the board of directors of defendant bank there were present Directors Tuger, Harrison and Church. Vice-President Tuger presided at that meeting (pp. 233, 236).

It also appears that at the meeting of the directors of defendant bank on January 23rd, 1909, Mr. Tuger was elected vice-president of the bank (p. 240).

Now, at the meeting of February 8th, 1909, a line of credit of $6,000 was granted to the St. Louis Chemical Company (p. 233). Whether it be shown by specific facts or not that at that meeting nothing was said or discussed concerning the financial condition of the Chemical Company, it is beyond human credibility that that subject was not brought up and fully and fairly discussed. If it was discussed each and every one of those three men, acting as officials of defendant bank, had sufficient information concerning the financial career and condition of the Chemical Compay then present in their minds to enable them to agree without discussion that its financial affairs were hopeless. If they did not discuss its affairs at that time, which is im-

possible, it was because each and all knew that its affairs were hopeless and they did not want to dwell upon so painful a subject. In any event, they were not then and there acting in a capacity adversary to the bank and the motion touching a line of credit to the Chemical Company was simply and solely to comply with the requirements of the banking law, because they were then carrying the $5,000 note of that company. But, as stated, it is beyond human credibility to say that those three men each and all did not then and there have in mind the financial condition of the Chemical Company and did not then and there discuss that subject.

These men, at those meetings of January 23rd and Febru-8th were in no sense acting in an adversary capacity to the defendant bank, and whatever knowledge and whatever notice they had previously acquired in reference to the financial condition of the Chemical Company then and there became the knowledge of and notice to the defendant bank under the well-settled rule.

Mechem, Agency, Secs. 719, 721.
5 *Cyc.* 461.
Am. & Eng. Encyc of Law (*2nd Ed.*) *Vol* 1, *pp.* 1145-6.
Holden vs. N. Y. and Erie Bank, 72 *N. Y.* 286, 292.
First Nat. Bank vs. Erickson (*Neb.*), 31 *N. W. Rep.* 387, 390.
Gunster vs. Scranton Illuminating, etc. Co. (*Pa.*), 59 *Am. St. Rep.* 650, 659.

"When a bank officer is acting as a president or director of another concern, or as a trustee or executor of an estate, the knowledge acquired in the latter capacity is imputed to his bank according to the most general rule."
5 *Cyc.* 461.

"It is the rule, that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows. This rule is sometimes stated, so as to limit it to notice arising from, or at the time connected with, the subject-matter of his agency. Such notice must have come to the agent, it is said, while he is concerned for the principal, and in the course of every transaction, or

so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is shortlived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material."

Holden vs. New York and Erie Bank et al., 72 *N. Y.* 286, 292.

"The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it: Provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

Mechem, Agency, Sec. 721.

In short, this defendant was on notice as to the financial condition and scheme of the Chemical Company to take care of its directors at the expense of its general unsecured creditors, unless it be said that its directors were acting adversely to the bank. And in that connection, it is respectfully insisted that every act of Vice-President Tuger and Director Harrison, while acting as officers of the Chemical Company, were in behalf of and not against the defendant bank. It is true they were undertaking to take care of themselves at the same time that they were taking care of their

bank; but that showed merely a common interest and not an adversary relation.

Defendant bank was, as we have shown, claiming to be secured and was, perhaps or probably, secured by the bonds of the Chemical Company; whether it was so secured or not it was amply secured by the written guaranty of David E. Harrison and Max Lowenstein so that this case does not involve a question of loss by the defendant bank even if this judgment is affirmed and it has to pay it, but it involves simply and solely the question whether this bank, amply secured, shall be permitted to be used as a tool to help out the directors of the Chemical Company who are liable as guarantors to the bank, to the detriment of the creditors of the Chemical Company.

For the foregoing reasons we respectfully submit that the prayer of the petition and also the motion should be denied with costs.

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